

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. )  
W.A. DREW EDMONDSON, in his capacity as )  
ATTORNEY GENERAL OF THE STATE OF )  
OKLAHOMA and OKLAHOMA SECRETARY )  
OF THE ENVIRONMENT C. MILES TOLBERT, )  
in his capacity as the TRUSTEE FOR )  
NATURAL RESOURCES FOR THE )  
STATE OF OKLAHOMA, )

Plaintiffs, )

v. )

05-CV-0329 TCK-SAJ

1. TYSON FOODS, INC., )  
2. TYSON POULTRY, INC., )  
3. TYSON CHICKEN, INC., )  
4. COBB-VANTRESS, INC., )  
5. AVIAGEN, INC., )  
6. CAL-MAINE FOODS, INC., )  
7. CAL-MAINE FARMS, INC., )  
8. CARGILL, INC., )  
9. CARGILL TURKEY PRODUCTION, LLC, )  
10. GEORGE'S, INC., )  
11. GEORGE'S FARMS, INC., )  
12. PETERSON FARMS, INC., )  
13. SIMMONS FOODS, INC., and )  
14. WILLOW BROOK FOODS, INC., )

Defendants. )

CARGILL TURKEY PRODUCTION, LLC, )

Third Party Plaintiff, )

v. )

CITY OF WESTVILLE AND CITY OF )  
TAHLEQUAH, )

Third Party Defendants, )

and )

	)
TYSON FOODS, INC., TYSON POULTRY,	)
INC., TYSON CHICKEN, INC.,	)
COBB-VANTRESS, INC., GEORGE'S, INC.,	)
GEORGE'S FARMS, INC., PETERSON FARMS,	)
INC., SIMMONS FOODS, INC., AND	)
WILLOW BROOK FOODS, INC.,	)
	)
Third Party Plaintiffs,	)
	)
v.	)
	)
CITY OF TAHLEQUAH, <i>ET AL.</i> ,	)
	)
Third Party Defendants.	)

**CROSS-CLAIM OF CARGILL, INC. AGAINST  
CITY OF TAHLEQUAH, CITY OF WESTVILLE AND CITY OF WATTS**

**I. BACKGROUND**

Defendant/Cross-Claim Plaintiff Cargill, Inc. (referred to hereinafter as "Cargill"), having denied all liability to the State of Oklahoma, *ex rel.* W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("Plaintiffs"), hereby set forth its cross- claims pursuant to Fed. R. Civ. P. 13(g).

1. As specified in further detail below, Cargill's claims stated herein are prompted by and based upon the allegations contained in the Plaintiffs' First Amended Complaint ("Complaint"), which are incorporated by reference as though fully restated herein. In their Complaint, Plaintiffs assert that Cargill caused injury to the Illinois River Watershed ("IRW"),<sup>1</sup> including the biota, lands, water and sediments therein as a consequence of the practice of land applying poultry litter. Plaintiffs assert that the use of poultry litter in agricultural operations has resulted in the release and disposal of "hazardous materials," "hazardous wastes," and "solid

wastes” as those terms are defined by federal statute. Plaintiffs attribute their claimed injury to the release of nutrients such as phosphorus and nitrogen, as well as five additional constituents set forth in Paragraph No. 58 of the Complaint. Plaintiffs purport to state ten counts against Cargill, including claims for cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607(a); natural resource damages under CERCLA, 42 U.S.C. § 9607(f); injunctive relief under the Citizen Suit provision of the Solid Waste Disposal Act, (“SWDA”), 42 U.S.C. § 6972; public and private nuisance and nuisance *per se* under Oklahoma law and federal common-law; trespass under Oklahoma law; violations of Oklahoma statutes and regulations, namely 27A O.S. § 2-6-105, 2 O.S. § 2-18.1, 2 O.S. § 10-9.7, OAC §35:17-5-5, and OAC § 35:17-3-14; and unjust enrichment, and restitution and disgorgement under Oklahoma law. Plaintiffs are purporting to recover past and future damages, restitution, environmental assessment, remediation, punitive damages, temporary and permanent injunctive relief, attorney’s fees and costs.

2. Cargill denies that its conduct and that of the contract poultry farmers is anything other than lawful, prudent, agricultural activity that has been officially sanctioned by the Legislatures of the States of Oklahoma and Arkansas. By virtue of the broadly cast allegations of the Complaint, it is clear that Plaintiffs are asserting that any conduct within the IRW which results in the release of phosphates or phosphorus-containing compounds (hereinafter referred to collectively as “phosphorus”), nitrogen or any of the other listed constituents is unlawful activity, which gives rise to liability to Plaintiffs for damages and injunctive relief. As such, in light of Plaintiffs’ stated intention to hold Cargill jointly and severally liable for the entirety of the alleged injury claimed to exist in the IRW, Cargill is entitled and compelled to bring cross-claims

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<sup>1</sup> Complaint at ¶ 1

against other persons and entities who conduct activities within the IRW that release phosphorus, nitrogen or any other purportedly harmful constituent into the IRW. Should the Plaintiffs prevail on their claims and theories, thereby holding Cargill liable to any extent, City of Tahlequah, City of Westville and City of Watts ("Cross-Claim Defendants") should be liable in the same manner to the extent of their several share of liability under the theory of contribution, or in the alternative indemnity. Accordingly, Cargill sets forth the following allegations based upon its knowledge, information and/or belief.

3. Any contributions from poultry litter applications by Cargill or the poultry farmers with whom they contract to the overall loading of phosphorus, nitrogen or any other purportedly harmful constituent in the IRW (which contribution is denied) would be insignificant in comparison to the contributions of Cross-Claim Defendants and the thousands of other persons, corporations and political subdivisions operating in the IRW.

4. Numerous Municipal Publicly Operated Treatment Works ("POTWs") discharge directly into the tributaries in the IRW wastewater containing some or all of the same constituents identified in the Complaint. The Oklahoma Department of Environmental Quality ("ODEQ") has estimated that these POTWs, standing alone, account for over approximately one-third of the total observed phosphorus load in the IRW. No POTWs were joined by the Plaintiffs in the Complaint.

5. With respect to non-point source "dischargers" of phosphorus, the Oklahoma Conservation Commission ("OCC") has concluded that cattle operations are a larger contributor in the IRW than poultry farms. Cattle manure contains substantial amounts of some or all of the same constituents identified in the Complaint. No cattle operations were joined by the Plaintiffs in the Complaint.

6. The OCC has also concluded that stream bank erosion due to improper clearing of trees and vegetation along riparian lands throughout the IRW is the “primary problem” in the IRW. Eroded materials from improperly managed stream banks contain substantial amounts of some or all of the same constituents identified in the Complaint. None of the individuals responsible for the improper clearing or management of riparian lands in the IRW were joined by Plaintiffs in the Complaint.

7. Numerous landowners in the IRW, including large hay farmers, apply large quantities of commercial fertilizers, herbicides and pesticides to lands in the IRW including lands located in close proximity to the creeks, streams and rivers comprising the tributary system in the IRW. These commercial fertilizers, herbicides and pesticides contain substantial amounts of some or all of the same constituents identified in the Complaint. None of the sellers, distributors, applicators or users of commercial fertilizers, herbicides and pesticides in the IRW were joined by Plaintiffs in the Complaint.

8. The OCC has reported for several years now that several large Oklahoma nurseries have substantially contributed to phosphorus and nitrogen loading in the IRW. None of these nurseries were joined by Plaintiffs in the Complaint.

9. Decentralized underground wastewater treatment and storage systems such as septic tanks and community sewage systems (collectively referred to as “Private Sewage Systems”) are located throughout the IRW, often times located in close proximity to the creeks, streams and rivers comprising the tributary system in the IRW. These Private Sewage Systems discharge large quantities of some or all of the same constituents identified in the Complaint into the soil and groundwater in the IRW. Due to the geologic features of the soil and groundwater in the IRW, the constituents discharged from these Private Septic Systems are readily transported

to the nearby creeks, streams and rivers comprising the tributary system in the IRW. None of the owners and operators of these Private Septic Systems were joined by Plaintiffs in the Complaint.

## **II. PARTIES**

### **Cargill**

10. Cargill, Cargill, Inc. is a corporation under the laws of Delaware, and has its principal place of business in Minneapolis, Minnesota.

## **III. Cross-Claim Defendants**

11. Cross-Claim Defendant, the City of Tahlequah, is a municipal corporation in the State of Oklahoma, which discharges treated sewage and/or wastewater pursuant to NPDES permit no. OK0026964, and has allowed the disposal of sewage sludge from its treatment plants into the IRW, which include but are not limited to the constituents alleged to have been discharged into the IRW in the Complaint. Upon information and belief, the City of Tahlequah has also engaged in the practice of applying fertilizers and pesticides to properties of the City of Tahlequah within the IRW. Upon information and belief, City of Tahlequah systematically applies fertilizers and other chemicals to its lands and easements located within the IRW. Tahlequah City Golf Course also has sewage lagoons which receive a portion of the runoff from the fairways. The operations and activities described above have and continue to result in the release of phosphorus and other constituents into the IRW. Accordingly, if the conduct of Cargill gives rise to liability to the Plaintiffs under their claims set forth in the Complaint (which is denied), then the City of Tahlequah's conduct and operations, which results in the release of some or all of the same constituents into the IRW, gives rise to its liability to Cargill under the theories of contribution and/or indemnity.

12. Cross-Claim Defendant, the City of Westville, is a municipal corporation in the State of Oklahoma, which discharges treated sewage and/or wastewater pursuant to NPDES permit no. OK0028126, and has allowed the disposal of sewage sludge from its treatment plants into the IRW. Upon information and belief, the City of Westville has also engaged in the practice of applying fertilizers and pesticides to properties of the City of Westville within the IRW. These activities are on-going and continuous. The operations and activities described above have and continue to result in the release of phosphorus and other constituents into the IRW. Accordingly, if the conduct of Cargill gives rise to liability to the Plaintiffs under their claims set forth in the Complaint (which is denied), then the City of Westville's conduct and operations, which results in the release of some or all of the same constituents into the IRW, gives rise to its liability to Cargill under the theories of contribution and/or indemnity.

13. Cross-Claim Defendant, the City of Watts, is a municipal corporation in the State of Oklahoma, which discharges treated sewage and/or wastewater, and has allowed the disposal of sewage sludge from its treatment plants into the IRW. Upon information and belief, the City of Watts has also engaged in the practice of applying fertilizers and pesticides to properties of the City of Watts within the IRW. These activities are on-going and continuous. The operations and activities described above have and continue to result in the release of phosphorus and other constituents into the IRW. Accordingly, if the conduct of the Cargill gives rise to liability to the Plaintiffs under their claims set forth in the Complaint (which is denied), then the City of Watt's conduct and operations, which results in the release of some or all of the same constituents into the IRW, give rise to its liability to Cargill under the theories of contribution and/or indemnity.

#### **IV. JURISDICTION AND VENUE**

14. This court has subject matter jurisdiction over the claims set forth herein on the same basis as the Court has jurisdiction over the claims and parties identified in the Complaint. The damages claimed by the Plaintiffs in the Complaint are alleged to have been caused by Cargill and others' activities within the Illinois River Watershed as defined by the Plaintiffs in Paragraph Nos. 22-23 of the Complaint. Cargill likewise asserts that the acts and omissions of the Cross-Claim Defendants occurred within the State of Oklahoma. Moreover, Plaintiffs have alleged claims under CERCLA and SWDA seeking abatement, assessment damages, remediation, damages for loss value and restoration of the natural resource, pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 9613 (b) and 42 U.S.C. § 6972(a). Additionally, this Court has supplemental jurisdiction over this matter and any claims for contribution from other potential responsible parties under CERCLA and SWDA, and state law claims for contribution and indemnification pursuant to 28 U.S.C. § 1367.

15. Personal jurisdiction is properly exercised over Cross-Claim Defendants because the activities engaged in by Cross-Claim Defendants are occurring or have occurred on property located within the State of Oklahoma. *See* Fed. R. Civ. P. 4(e), (k).

#### **V. STATEMENTS OF FACT**

##### **A. The Underlying Lawsuit**

16. Plaintiffs filed their Complaint against Cargill and others on June 13, 2005. On August 18, 2005, Plaintiffs filed their Amended Complaint against Cargill and others, a copy of which is attached hereto as Ex. "1."

17. Plaintiffs purport to bring their claims as "Attorney General of the State of Oklahoma and...Trustee for Natural Resources of the State of Oklahoma...." (Am. Cmplt. pg. 1).



18. Plaintiffs allege that Cargill and others' operations in the IRW have "caused injury to the IRW, including the biota, lands, waters and sediments therein."

19. Plaintiffs allege the "1,069,530-acre Illinois River Watershed ("IRW") straddles the Oklahoma-Arkansas border. The approximately 576,030 acres of the IRW that are located in Oklahoma include portions of Delaware, Adair, Cherokee and Sequoyah counties...as well as its major tributaries, the Baron (a/k/a Barren) Fork River, the Caney Creek and the Flint Creek." (Am. Cmplt. at ¶¶ 22, 23).

20. Plaintiffs allege the "Illinois River feeds into the 12,900 acre Tenkiller Ferry Lake...." (Am. Cmplt. at ¶ 26).

21. Plaintiffs allege that "[i]n recent years these resources have been and are continuing to be polluted, degraded, and their uses have been and are continuing to be injured and impaired", and that "[t]his pollution of and injury to the IRW, including the biota, lands, waters and sediments therein, are indivisible," which Cargill has denied and continues to deny. [Am. Cmplt. at ¶¶ 29, 30].

22. Plaintiffs allege that Cargill "[is] responsible for this pollution of, as well as the degradation of, impairment of and injury to the IRW, including biota, lands, waters and sediments therein", by virtue of its growers' agriculture practices. Those alleged agriculture practices include the land application of poultry litter as a fertilizer "in excess of any agronomic need," which Cargill has denied and continues to deny. [Am. Cmplt. at ¶ 31, 50]

23. Plaintiffs allege that any application of poultry litter in excess of agronomic need "constitutes waste disposal rather than any normal or appropriate application of fertilizer," which Cargill has denied and continues to deny [Am. Cmplt. at ¶ 50].

24. Plaintiffs allege these alleged “waste disposal practices lead to run-off and release of large quantities of phosphorous and other hazardous substances, pollutants and contaminants in the poultry waste onto and from the fields and into the waters of the IRW,” and “large quantities of phosphorous and other hazardous substances, pollutants and contaminants to accumulate in soils,” which lead to continued and future run-off into the waters of the IRW, which Cargill has denied and continues to deny. [Am. Cmplt. at ¶¶ 52, 53]

25. Plaintiffs allege that poultry litter contains “a number of constituents that can and do cause harm to the environment and pose human health hazards.” The constituents alleged by Plaintiffs include:

- a. phosphorus/phosphorus compounds;
- b. nitrogen/nitrogen compounds;
- c. arsenic/arsenic compounds;
- d. zinc/zinc compounds;
- e. copper/copper compounds;
- f. hormones; and/or
- g. microbial pathogens.

26. Plaintiffs allege that “[t]he lands and waters in the IRW...contain elevated levels of a number of constituents.” [Am. Cmplt. at ¶¶ 58, 59].

27. Plaintiffs assert that the nutrients and metal compounds listed above in Paragraph No. 25 are hazardous substances under CERCLA, which Cargill denies. [Am. Cmplt. at ¶¶ 61, 62].

28. Plaintiffs assert that “poultry waste is a solid and/or hazardous waste under the SWDA,” which Cargill has denied and continue to deny. [Am. Cmplt. at ¶ 92]

29. Plaintiffs allege that Cargill “has in the past been or is now a generator of poultry waste and/or has in the past been or is now an owner or operator of a treatment, storage or disposal facility for poultry waste,” which Cargill has denied and continues to deny. [Am. Cmplt. at ¶ 93].

30. Plaintiffs allege that Cargill is “a ‘person’ as defined by SWDA who has contributed to and/or is contributing to the past or present handling, storage, treatment, transportation or disposal of poultry waste in the IRW...,” which Cargill has denied and continues to deny. [Am. Cmplt. at ¶ 94].

31. Plaintiffs allege that “[a]n imminent and substantial endangerment to health or the environment may be presented and is in fact presented as a direct and proximate result of ... [Cargill’s] ... contribution to the handling, storage, treatment, transportation or disposal of poultry waste in the IRW...,” which Cargill has denied and continues to deny. [Am. Cmplt. at ¶ 95].

32. Plaintiffs claim that Cargill has “intentionally” created a private and public nuisance under both Oklahoma and Federal law “[a]s a result of [its] poultry waste disposal practices,” which include the “placement/contribution to the placement of poultry wastes where they are likely to cause pollution,” which Cargill has denied and continues to deny. [Am. Cmplt. at ¶¶ 99-104, 110-114].

33. Plaintiffs have also claimed that Cargill’s activities as alleged in the Complaint constitute “an actual and physical invasion of and interference with the State of Oklahoma’s property interests in the IRW...,” which Cargill has denied and continues to deny. [Am. Cmplt. at ¶¶ 120-122].

34. Plaintiffs allege that Cargill has violated 27A O.S. § 2-6-105, 2 O.S. § 2-18.1 “by and through [its] wrongful poultry waste disposal practices...,” and thus, Plaintiffs state they are entitled to civil penalties for each respective violation pursuant to 27A O.S. § 2-3-504 and 2 O.S. § 2-16, which Cargill has denied and continues to deny. [Am. Cmplt. at ¶¶129-132].

35. Plaintiffs further allege that Cargill has violated the Animal Waste Management Plan criteria set forth in Oklahoma Administrative Code, § 35:17-3-14 by its “wrongful poultry waste disposal practices...,” and thus, Plaintiffs state they are entitled to civil penalties pursuant to 2 O.S. § 9-212, which Cargill has denied and continues to deny. [Am. Cmplt. at ¶¶ 138, 139].

36. Plaintiffs claim by engaging “in improper poultry waste disposal practices,” Cargill has “avoided the costs of properly managing and disposing of [its] poultry waste” to its economic benefit and at the expense of the Plaintiffs’ rights, and thus, Cargill has had a benefit conferred upon it by Plaintiffs. Plaintiffs claim that this is an unjust enrichment and seek “disgorgement of all gains...realized in consequence of [its] wrongdoing,” which Cargill has denied and continues to deny. [Am. Cmplt. at ¶¶ 141-147].

37. Pursuant to their claims, Plaintiffs are seeking all past monetary damages, future damages, permanent injunctive relief, declaratory judgment, restitution, exemplary damages, statutory penalties, pre-judgment interest, attorney’s fees and costs (including but not limited to court costs, expert and consultants costs, and litigation and investigative expenses). [Am. Cmplt. at Prayer for Relief ¶¶ 1-8].

#### **B. General Allegations Regarding Cross-Claim Defendants**

38. Cargill incorporates Paragraph Nos. 1 through 37 as though fully set forth herein.

39. Cargill has denied and continues to deny all of the Plaintiffs' allegations of wrongdoing, and denies that it is responsible for or has contributed to any purported pollution in the IRW.

40. Cargill served Cross-Claim Defendants, City of Tahlequah, City of Westville, and City of Watts on September 28, 2005 with its written notice of Cargill's claims against them based upon Plaintiffs' claims pursuant to the Oklahoma Governmental Tort Claims Act, 51 O.S. § 156 and under the Solid Waste Disposal Act ("SWDA"), by registered mail, properly addressed and postage prepaid to Cross-Claim Defendants. [Notices, attached hereto as Ex. "2"].

41. Cross-Claim Defendants, City of Tahlequah, City of Westville, City of Watts, either denied or failed to respond to Cargill's claims within ninety (90) days of its submission; thus, Cargill's contribution and/or claims have been deemed denied pursuant to 51 O.S. § 157.

42. Cross-Claim Defendants have and continue to engage in operations and/or activities within the IRW, more specifically identified in Paragraph Nos. 11 - 13, which include but are not limited to discharging sewage and wastewater, applying of organic and commercial fertilizer and chemicals, and engaging in other activities which result in the release of some or all of the constituents alleged in the Complaint into the IRW as defined by Plaintiffs. [Am. Cmplt. at ¶¶58, 61-64].

43. To the extent the Court finds the natural resources of the IRW, including the biota, lands, waters and sediments have been adversely impacted as alleged by Plaintiffs in their Complaint, such adverse impacts have been caused or contributed to by the acts and omissions of Cross-Claim Defendants which have resulted in the release of the same or similar constituents as those allegedly contained in poultry litter into the IRW, as set forth in Paragraph No. 25, above.

44. As stated in their Complaint, Plaintiffs allege that Cargill, by applying poultry litter as a fertilizer to the lands within the IRW, have caused and are causing “an unreasonable invasion of, interference with, impairment to, inconvenience to, annoyance to and injury to the State of Oklahoma and the public’s beneficial use and enjoyment of the IRW, including the biota, lands, waters and sediments therein.” [Am. Cmplt. at ¶¶ 100, 111].

45. Although Cargill has denied and continues to deny all of the allegations of wrongdoing as alleged by Plaintiffs, should Cargill be found liable to Plaintiffs and Plaintiffs recover damages or injunctive relief pursuant to any of Plaintiffs’ claims for nuisance, trespass, unjust enrichment, or violations of 27A O.S. § 2-6-105 and 2 O.S. § 2-18.1, and OAC, § 35:17-3-14, Cargill asserts that it is entitled to contribution pursuant to 12 O.S. § 832 and/or indemnification from Cross-Claim Defendants based upon their operations and/or activities within the IRW.

46. As stated in the Complaint, Plaintiffs allege that “[t]he IRW, including the lands, waters and sediments therein, constitutes a ‘site or area where a hazardous substance...has been deposited, stored, disposed of, or place, otherwise come to be located;’ and, as such, constitutes a ‘facility’ within the meaning of CERCLA, 42 U.S.C. § 9601(9).” [Am. Cmplt. at ¶¶ 72, 81].

47. While Cargill denies and continues to deny the allegations of wrongdoing contained within the Complaint, Cargill states that should the Court find that the IRW, including the biota, lands, waters and sediments therein constitute a “facility” under CERCLA, 42 U.S.C. § 9601(9), then the IRW is also a “facility” as to the Cross-Claim Defendants’ operations and/or activities within the IRW.

48. As stated in the Complaint, Plaintiffs allege that Cargill “is a ‘person,’ and thus, a potentially responsible party within the meaning of CERCLA, 42 U.S.C. § 9601(21).” If the

Court finds that Cargill, based upon the activities of their independent growers, is a “person” within the meaning of CERCLA, 42 U.S.C. § 9601(21), then Cross-Claim Defendants are also “persons” under CERCLA in that they, individually and collectively, engage in operations and/or activities within the IRW that have and continue to result in the release of phosphorous and some or all of the constituents alleged in the Complaint into the IRW.

49. As stated in the Complaint, Plaintiffs allege that Cargill is covered within the meaning of CERCLA, 42 U.S.C. § 9607(a), in that it “[has] arranged for disposal of [its] poultry waste which contains hazardous substances...which has been released to and within the IRW...,” and that they “individually and collectively, have been owners and/or operators during the time their poultry waste containing these hazardous substances was generated and disposed of and released into the IRW....” If the Court finds that Cargill is a potentially responsible party under CERCLA, 42 U.S.C. § 9607(a), then Cross-Claim Defendants are also potentially responsible parties under CERCLA in that they, individually or collectively, engage in operations and/or activities within the IRW that have and continue to result in the release of phosphorous and some or all of the constituents alleged in the Complaint into the IRW. [Am. Cmplt. at ¶¶ 74, 75, 83 and 84].

50. Plaintiffs allege in the Complaint that by and through Cargill’s activities and operations, “‘hazardous substances’ within the meaning of CERCLA, 42 U.S.C. § 9601(14)...were disposed of in the IRW, including the lands, waters and sediments therein, resulting in ‘releases’ and/or ‘threatened releases’ of hazardous substances within the meaning of CERCLA, 42 U.S.C. § 9601 (22).” In the event, the Court finds that poultry litter as outlined in Plaintiffs’ Complaint at Paragraph Nos. 79 and 80, is a “hazardous substance” within the meaning of CERCLA, then Cross-Claim Defendants’ activities and/or operations within the IRW

which result in the release or threatened release of some or all of the same constituents as poultry litter would, likewise, be considered a release of a “hazardous substance” under CERCLA into the IRW. [Am. Cmplt. at ¶¶ 72, 80].

51. While continuing to deny the allegations of wrongdoing in the Complaint, in the event that Cargill is found liable under Plaintiffs’ CERCLA cost recovery claims for the alleged release of “hazardous substances,” then Cross-Claim Defendants should, likewise, be liable for their activities and/or operations within the IRW which result in the release of the same alleged “hazardous substances” into the IRW.

52. Although Cargill has denied and continues to deny all of the allegations of wrongdoing as alleged by Plaintiffs, should Cargill be found liable under CERCLA § 107 for Plaintiffs’ cost recovery claims, and be ordered to pay response costs, which include, but are not limited to costs of monitoring, assessing and evaluation of the waters, wildlife and biota in the IRW, to the Plaintiffs, then Cargill is entitled to contribution pursuant to CERCLA, 42 U.S.C. § 9613(f) from Cross-Claim Defendants because their activities and/or operations within the IRW have resulted in the release of some, if not all of the same constituents alleged by the Plaintiffs as “hazardous substances.” Thus, as a result of their conduct, if Cargill is required to pay any damages to Plaintiffs, then Cross-Claim Defendants should be required to pay for their respective shares of any response costs adjudged against Cargill.

53. Although Cargill has denied and continues to deny all of the allegations of wrongdoing as alleged by Plaintiffs, should Cargill be found liable to Plaintiffs under CERCLA, and a declaratory judgment be entered holding Cargill liable for all future necessary responses costs, then Cargill is entitled to a declaratory judgment from Cross-Claim Defendants holding them similarly liable for their respective shares of any future response costs due to their activities



and/or operations within the IRW, which have resulted in the release of some, if not all, of the same constituents alleged by the Plaintiffs as “hazardous substances.” Furthermore, if Cargill is required to pay any future necessary response costs pursuant to any declaratory judgment entered by the Court, then Cross-Claim Defendants should, likewise, be required to pay for their respective shares of any future necessary response costs adjudged against the Cargill.

54. Plaintiffs also seek natural resource damages pursuant to 42 U.S.C. § 9607. In the Complaint, Plaintiffs allege that “[t]he Oklahoma Secretary of the Environment, acting on behalf of the State of Oklahoma, is the designated CERCLA trustee for ‘natural resources’ in, belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the State of Oklahoma,” and that as trustee, the Oklahoma Secretary of the Environment “shall assess damages to natural resources for purposes of CERCLA for those natural resources under their trusteeship.” [Am. Cmplt. at ¶ 79].

55. Plaintiffs claim that “[a]s a result of the release of hazardous substances...into the IRW...there has been injury to, destruction of, and loss of natural resources in the IRW, including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources therein....” According to Plaintiffs’ allegations, these alleged injuries are “continuing” in nature, and Plaintiffs have “incurred reasonable and necessary costs to assess and evaluate this injury and loss of natural resources.” [Am. Cmplt. at ¶¶ 85-87].

56. For their alleged natural resource damages claim under CERCLA, 42 U.S.C. § 9607 (a), Plaintiffs seek “(a) the cost to restore, replace, or acquire the equivalent of such natural resources; (b) the compensable value of lost services resulting from the injury to such natural resources; and (c) the reasonable cost of assessing injury to the natural resources and the resulting damages.” [Am. Cmplt. at ¶ 89].

57. While continuing to deny the allegations of wrongdoing in the Complaint, in the event that Cargill is found liable under Plaintiffs' CERCLA § 107 natural resource damages claim for the alleged release of "hazardous substances," then Cross-Claim Defendants should, likewise, be liable for their activities and/or operations within the IRW which resulted in the release of the same alleged "hazardous substances" into the IRW.

58. Although Cargill has denied and continues to deny all of the allegations of wrongdoing as alleged by Plaintiffs, should Cargill be found liable under CERCLA § 107, and be ordered to pay natural resource damages to Plaintiffs, which could include, but not be limited to "(a) the cost to restore, replace, or acquire the equivalent of such natural resources; (b) the compensable value of lost services resulting from the injury to such natural resources; and (c) the reasonable cost of assessing injury to the natural resources and the resulting damages," then Cargill is entitled to contribution pursuant to CERCLA, 42 U.S.C. § 9613(f) from Cross-Claim Defendants for their respective share of those damages because their activities and/or operations within the IRW have resulted in the release of some, if not all, of the same constituents alleged by the Plaintiffs as "hazardous substances" for their respective share of those damages.

59. In the Complaint, Plaintiffs allege that Cargill is responsible for the past and present handling, storage and disposal of "a solid and/or hazardous waste" that presents "an imminent and substantial endangerment to health and the environment in the IRW." Plaintiffs' allegations are that the application of poultry litter as a fertilizer and/or soil conditioner by Cargill's growers and other third parties to the lands within the IRW, presents an imminent and substantial endangerment to health and the environment. [Am. Compl. at ¶¶ 92-96].

60. Upon information and belief, Cross-Claim Defendants are responsible for their past and present activities and operations in the IRW, which has resulted in the release of some

or all of the same constituents allegedly contained in poultry litter into the IRW. Therefore, if the Court finds that the application of poultry litter and its constituents as a fertilizer and/or soil conditioner to lands within the IRW constitutes the release of “a solid and/or hazardous waste under SWDA,” then the past and present conduct and activities of Cross-Claim Defendants which result in the release of some or all of the same constituents as allegedly contained in poultry litter into the IRW would also constitute the release of “a solid and/or hazardous waste under SWDA.”

61. Furthermore, if the Court finds that the application of poultry litter as a fertilizer and/or soil conditioner by Cargill’s growers and other third party property owners constitutes the past and present handling, storage and disposal of “a solid and/or hazardous waste,” and further finds that Cargill has created an alleged imminent and substantial endangerment in the IRW under SWDA, then the Court must also find that Cross-Claim Defendants’ activities and/or operations as defined in Paragraph Nos. 11 - 13, above, which result in the release of some or all of the same constituents Plaintiffs allege are contained within poultry litter into the IRW, also constitute the past and present handling, storage and disposal of “a solid and/or hazardous waste,” and therefore, Cross-Claim Defendants must also be found liable for creating any alleged imminent and substantial endangerment in the IRW under SWDA.

62. Therefore, in the event the Court finds Cargill liable under SWDA, then Cross-Claim Defendants must also be held liable under SWDA for their activities and operations within the IRW. Moreover, if the Court issues any injunctive relief whether it be temporary or permanent against Cargill, or requires it to engage in any clean-up, assessment or remediation efforts, Third Party Defendants should also be required to participate in any injunctive relief, clean-up, assessment or remediation efforts.

### **PRAYER FOR RELIEF**

WHEREFORE, in the event Plaintiffs should receive any judgment against Cargill, Inc., for damages for their alleged injuries, Cargill, Inc. likewise demands judgment against the Cross-Claim Defendants, City of Tahlequah, City of Westville, and City of Watts on each of the claims alleged, including but not limited to the following:

(1) any injunctive relief granted against Cargill, Inc. including any relief which requires Cargill, Inc. to remediate, abate any activity or condition, and/or pay any costs associated with assessing and quantifying the amount of remediation or natural resource damages;

(2) any liability assessed for past monetary damages including all costs and expenses;

(3) any declaratory relief granted by the Court against Cargill, Inc. including any liability for future damages including all costs and expenses;

(4) any restitution damages;

(5) any punitive or exemplary damages;

(6) any federal or state statutory penalties;

(7) attorneys' fees and costs;

(8) prejudgment interest; and

(9) any further relief the Court deems just and appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 15<sup>th</sup> day of March 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached document by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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s/ John H. Tucker